IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.784 OF 2001
IN
NOTICE OF MOTION NO.2053 OF 2001
IN
S.C.SUIT NO.2662 OF 2001

1. Monocast Engineering Services,)
   Sole Proprietory Concern)

2. Ranganath Anant Haridas,)
   Age 58 years, Sole Proprieor of No.1)
   above and both having their address)
   at 13th Floor, Golden Heights "B",)
   Anant Patil Marg,)
   Opposite Shivaji Park Telephone)
   Exchange, Dadar (Wes),)
   Bombay 400 028.)-Appellants

Versus

Golden Heights "B" Co-operative Housing)
Society Ltd., a Society registered under)
the Maharashtra Co-operative Societies)
Act, Having its registered office at)
Golden Heights "B", Anand Patail Marg,)
Opposite Shivaji Park Telephone Exchange)
Dadar (West), Mumbaai 400 028.)-Respondent

Shri P.R.Kadam alongwith Shri M.A.Narvekar for the Appellants.

Shri Anilkumar Singh alongwith Shri D.R.Shah for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE : APRIL 22 & 23, 2007.

JUDGMENT:

1. Submissions of the learned counsel appearing for the parties were heard on the last date and on

account of paucity of time, the Judgment was not delivered on that day. The Appeal is by the original Defendants who have taken exception to the order dated 29th June, 2001 passed by the learned Judge of the City Civil Court, Bombay by which a Notice of Motion taken out by the Respondents-Plaintiffs has been allowed. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief.

2. The Respondent is a Co-operative Housing Society. The first Appellant is a developer and the second Appellant is the proprietor of the first Appellant. On 14th August, 1982 the Appellants entered into a development agreement with the owners of the Final Plot No.707, TPS IV, Mahim Division, Mumbai. The Appellants started construction of buildings ‘A’ and ‘B’ in the year 1993. The Respondent-Society is formed by the flat purchasers of the building constructed by the Appellants. In the plaint it is averred that at that time there were 13 members of the Respondent-Society. It is stated that "Golden Heights", ‘B’ building was constructed for flat purchasers. It is stated that to the Trust which

was the original owner of the property, certain flats were to be provided in a building which was to be constructed separately. It is stated that there is open space on the ground floor for parking the vehicles. The building ‘B’ consists of 13 floors with a terrace. Agreements have been entered into with different flat purchasers by the Appellants in the year 1995-96. Reliance was placed by the Respondent-Society on the relevant clauses in Flat Sale Agreements in which it was provided that parking rights will be given to the flat purchasers. The Respondent alleged in the plaint that the Appellants completed only the external plastering and installed one of the two lifts. It is alleged that though overhead and under ground water tanks were constructed, pumps were not provided and pump room was not constructed. It is stated that Members of the Respondent-Society have carried out and completed internal work such as putting doors and windows, plumbing work, tiling work in their respective flats at their own cost. It is contended that as per the Development Control Regulations, two lifts ought to have been provided. It is alleged that office has not been provided to the Respondent but it is kept under lock and key of the Appellants. It is stated that the

second Appellant is residing on 13th floor and is obstructing the flat purchasers in their use of common amenities such as terrace and common areas. It is stated that even Lift Inspector's approval was not obtained by the Appellants for operation of the lift. Various other deficiencies have been pointed out in the work carried out by the Appellants. It is alleged that property taxes have not been paid and therefore, the Municipal Corporation has issued warrants of attachment.

3. The allegation in the plaint is that plans of the said building have been got modified by the Appellants with the object of converting the stilt area for their own use. It is alleged in the plaint that the second Appellant took the extreme step of locking out all the vehicles of all the members. The Appellants also prevented entry of the vehicles in the compound.

4. It is alleged that the Appellants have not complied with statutory obligations under the Maharashtra Ownership Flats (Regulation of the Promotion of construction, Sale, Management and Transfer) Act, 1963, (hereinafter referred to as the

said Act of 1963). The statutory obligations of the Appellants have been listed in the plaint.

5. Various reliefs have been claimed by the Respondent such as direction to complete the balance work. Perpetual injunction is prayed restraining the Appellants from amending the sanctioned plan, converting the stilt/and or any other portion of the property for any other purpose. Injunction is also prayed restraining the Appellants from interfering with the use of the common terrace and common open space, society office premises etc by the Members of the Society. Injunction is also prayed restraining the Appellants from alienating, encumbering, parting with possession of the basement or allowing use of basement for any purpose other than parking. In the Notice of Motion which is subject matter of the present Appeal the Respondent-Society has prayed for injunction in following terms (prayers (a) and (b)) which reads thus:

> "(a) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to grant an order and injunction restraining the

Defendants, their servants, agents and representatives from amending the sanctioned plans as it stands today, converting the stilt and/or any other portion of the said property for any purpose other than for the purpose for which it is granted, and from obstructing, interfering with the Plaintiff society's members use of the said premises including the use of the common terrace, common open space, society office premises viz.Final Plot No.707, TPS IV, Mahim Area, Anant Patil Marg, Dadar, Mumbai 400 028 in any manner whatsoever;

(b) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to grant an order and injunction of this Hon'ble Court restraining the Defendants, their servants, agents and representatives from alienating, encumbering, parting with possession of the basement or allowing use of the basement for any

purpose other than for parking".

6. By the impugned order, the Notice of Motion has been made absolute in terms of both prayers (a) and (b) with certain clarification. It is clarified that the order of injunction shall not cover and shall not operate in respect of the area being used by the Appellants as an office which has been shown in the sanctioned plan as society's office.

7. A reply was filed by the Appellants to the Notice of Motion raising various contentions. In the reply it is stated that as per the approved plan, the seventh floor of the 'A' Wing is provided as a common terrace and refuge area for benefit of occupants of Golden Heights 'B' Wing. It is contented that the terrace of 'B' Wing which is on 14th floor is not available for the benefit of the flat purchasers of the 'B' Wing. It is contended that the terrace above 'B' Wing is exclusive property of Appellants. It is stated that construction of 'A' Wing is complete. However, possession thereof was not handed over to the original owners due to various disputes. It is denied that work was not fully completed in 'B' Wing. It is contended that as the Appellants have exclusive right

in respect of terrace above ‘B’ Wing, further construction cannot be prevented and no flat purchaser has any right in respect terrace above the ‘B’ Wing.

8. The learned counsel appearing for the Appellants has made detailed submissions. He submitted that the terrace above ‘B’ Wing was never available to the flat purchasers and the terrace above the ‘A’ Wing is provided as a common terrace to the flat purchasers. He submitted that the flat purchasers of flats in ‘B’ wing cannot claim any right in respect of the building save and except the flats which are allotted to them. He placed reliance on various clauses incorporated in the Agreements executed by the Appellants in favour of the flat purchasers and submitted that in view of the consent recorded in the Agreements, the Respondent cannot contend that the Appellants cannot get the plans modified without their consent. He has placed reliance on a decision of the learned single Judge of this Court. He submitted that the Respondent Society cannot prevent the Appellants from carrying out further development and from enjoying the property which they have taken for development.

9. The learned counsel appearing for the Respondent supported the impugned order by pointing out the conduct of the Appellants. He pointed out that incomplete work in 'B' Wing was required to be completed by the flat purchasers at their cost. He submitted that under the provisions of the said Act of 1963, a promoter/builder cannot become exclusive owner of terrace and other open areas in the property. He submitted that save and except the premises which are covered by definition of 'flat' no other part of the property can be sold by the Appellants as per the provisions of said Act of 1963. All common areas and amenities will have to be conveyed in favour of the Respondent-Society. He submitted that considering the conduct of the Appellants, no interference is called for with the discretionary order of temporary injunction passed by the trial Court.

10. I have considered the submissions. It is not disputed that the Appellants are promoters within the meaning of said Act of 1963 and they are bound by the obligations under the said Act of 1963. There is prima facie material on record to show that the entire work of 'B' Wing was not completed by the Appellants and the internal work was carried out by individual

flat purchasers. The Appellants have not performed their obligation of conveying the property to the Co-operative Society of flat purchasers for a period of a decade and more.

11. In the background of the aforesaid factual position it will be necessary to refer to the findings recorded by the trial Court. The trial Court has protected the possession of the Appellants over the office premises which is infact shown in the sanctioned plan as the office of the society. The learned trial Judge has referred to the provisions of the said Act of 1963. The trial Court has also noted the breaches committed by the Appellants. The learned Judge has noted that for a high rise building only one lift has been provided instead of two lifts as provided in the rules. The learned Judge has noted the inconvenience caused to the flat purchasers and members of the Respondent Society.

12. It must be stated here that the order impugned passed on 29th June, 2001 is operating as of today. Initially, at the time of admitting the Appeal, on 29th August, 2001, this Court stayed the operation of the impugned order but at the same time directed the

parties to maintain status-quo with regard to the suit property as on the day. On 10th June, 2003 this Appeal From Order was dismissed for default. The Appeal was restored by order dated 23rd February, 2007. In order dated 23rd February, 2007 it is clarified that the parties shall not alter the user of common terrace in any manner. This Court permitted the Respondent to continue repairing work including plumbing, painting, water proofing of the building and the common terrace. Thus, after the Appeal was restored, the ad-interim relief granted on 29th August, 2001 was not restored.

13. The learned trial Judge has made the Notice of Motion absolute in terms of prayer clauses (a) and (b) of the Notice of Motion. The prayer (a) is for restraining the Appellant-Defendants from amending the sanctioned plans, converting the stilt and or any other portion of the suit property for any purpose other than for the purpose for which it is granted. The second part of prayer (a) prevents the Appellants from obstructing members of the Respondent-Society from using the common terrace, common open space etc. Prayer (b) is for preventing the Appellants from parting with possession of the basement or allowing

the use of basement for any purpose other than for parking.

14. One of the submissions made by the learned counsel for the Appellants was that construction of additional floors is permissible in view of section 7A of the said Act of 1963 and for that purpose consent in writing of the flat purchaser is not necessary. Reliance is placed on a decision of this Court in the case of **The Mohatta Nagar Co-operative Housing Society Ltd Vs. M/s Vishram Khimji & Sons and others [1994 (1) Bombay Cases Reporter Page 444]**. Whether the proposed construction is an additional construction or whether the same is covered by section 7A of the said Act of 1963 are the matters of evidence to be recorded in the suit. As of today, prima facie it appears to me that the conveyance has not been executed by the Appellant-builders in favour of the Society within the time stipulated by the said Act of 1963 and rules framed therein. The question which arises is whether the Appellants can be allowed to take advantage of the delay on their part. If the Appellants had executed the conveyance within the time stipulated by law, there was no occasion for the Appellant to carry on further construction on the property. It is sought to

be contended that terrace of ‘A’ Wing is available to the members of the Respondent-Society. The members are not the occupants of the said building ‘A’ and they are occupants of ‘B’ building and therefore, it is doubtful whether the terrace on the other building can be said to be for common enjoyment of the members.

15. The suit is pending from the year 2001. Suffice it to say that the order of the trial Court protects the rights of the flat purchasers and the relief which is granted by way of interim relief is certainly in the aid of the final relief which is sought in the plaint.

16. Considering the material on record, it is obvious that original Plaintiffs have made out prima facie case. Prima facie, the Appellants have committed breaches of their obligations under the said Act of 1963. If during the pendency of the suit, the Appellants are permitted to carry on additional construction above the terrace and in the stilt and are permitted to part with basement or change the user of the basement, it is obvious that irreparable loss will be caused to the original Plaintiff. The order passed by the trial Court is a discretionary order

based on equitable considerations. In an Appeal against order, no interference is called for with the impugned Judgment and Order. A submission was sought to be made that if this Court is inclined to confirm the order of the trial Court, ad-interim order passed on 29th August, 2001 of directing the parties to maintain status-quo may be continued. As pointed out earlier, the said order came to an end on 10th June, 2003 when the Appeal was dismissed for default. Thereafter, the said order has not been restored. Looking to the nature of the dispute, interim order passed by the trial Court deserves to be confirmed.

17. Hence, I pass the following order:

(i) Appeal is dismissed with no orders as to costs.

(ii) All contentions of the parties in the pending suit are expressly kept open.

(iii) Suit will be decided without being influenced by the interim order passed by the trial Court and confirmation thereof by this Court.

(iv) The learned trial Court will endeavour to decide the suit expeditiously and preferably on or before 30th April, 2008.

(v) Parties to act upon an authenticated copy of this order.

JUDGE